From: LERS, EOIR (EOIR)
To: All of Judges (EOIR); BIA BOARD MEMBERS (EOIR); BIA ATTORNEYS (EOIR); All of OCIJ JLC (EOIR); Alder Reid, Lauren (EOIR); Allen, Patricia M. (EOIR); Baptista, Christina (EOIR); Barnes, Jennifer (EOIR); Bauder, Melissa (EOIR); Berkeley, Nathan (EOIR); BIA TEAM JLC; BIA TEAM P (EOIR); Brazill, Caitlin (EOIR); Burgie, Brea (EOIR); Burgus, Elizabeth (EOIR); Cicchini, Daniel (EOIR); Cowles, Jon (EOIR); Curry, Michelle (EOIR); Evans, Brianna (EOIR); Grodin, Edward (EOIR); Hartman, Alexander (EOIR); Kaplan, Matthew (EOIR); King, Jean (EOIR); Korniluk, Artur (EOIR); Lang, Steven (EOIR); Lovejoy, Erin (EOIR); Martinez, Casey L. (EOIR); Noferi, Mark (EOIR); Park, Jeannie (EOIR); Powell, Karen B. (EOIR); Ramirez, Sergio (EOIR); Rimmer, Phillip (EOIR); Rodrigues, Paul A. (EOIR); Rodriguez, Bernardo (EOIR); Rothwarf, Marta (EOIR); Sanders, John W. (EOIR); Schaaf, Joseph R. (EOIR); Sheehey, Kate (EOIR); Stutman, Robin M. (EOIR); Taufa, Elizabeth (EOIR); Vayo, Elizabeth (EOIR); Wilson, Amelia (EOIR)
Cc: McHenry, James (EOIR); Reilly, Katherine (EOIR); Santoro, Christopher A (EOIR); Moutinho, Deborah (EOIR); Adams, Amanda (EOIR); Pease, Jeffrey (EOIR); Morgan, Kenosha (EOIR); EOIR Library (EOIR); LERS, EOIR (EOIR)
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EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Office of Policy | Legal Education and Research Services Division

Policy & Case Law Bulletin
March 9, 2018

Federal Agencies

DOJ

- Attorney General Directs the Board to Refer its Decision in Matter of A-B- to Him for Review — EOIR

  27 I&N Dec. 227 (A.G. 2018)

  The Attorney General will review issues relating to "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." The Board's decision is stayed pending the Attorney General's review of the matter. He directed that the parties submit any briefs on or before April 6, 2018, and reply briefs on or before April 20, 2018. He further invited interested amici to submit briefs on or before April 13, 2018.

- Attorney General Directs the Board to Refer its Decision in Matter of E-F-H-L- to Him for Review and Vacates the Board's Decision — EOIR

  27 I&N Dec. 226 (A.G. 2018)

  The Attorney General vacated the Board's 2014 decision, which held that a respondent applying for asylum and withholding of removal was ordinarily entitled to a full evidentiary hearing. The Attorney General determined that the Board's decision was effectively moot, where the respondent withdrew the application upon which the evidentiary hearing was predicated with prejudice following the Board's decision. The Attorney General directed that the matter be recalendared on the Court's active docket.

- DOJ Files Preemption Suit Against the State of California to Stop Interference with Federal Immigration Authorities

  The Justice Department filed a complaint against the State of California, Governor of California Jerry Brown, and Attorney General of California Xavier Becerra, arguing that certain provisions of California law violate the Supremacy Clause by impermissibly interfering with the enforcement of federal immigration law, and requests declaratory and injunctive relief.

Virtual Law Library Weekly Update — EOIR

This update includes resources recently added to EOIR's internal or external Virtual Law Library, such as Federal Register Notices, country conditions information, and links to recently-updated immigration law publications.

DHS

- USCIS Assists in Investigation that Leads to Arrest, Conviction, and Sentencing of Participants in Marriage Fraud Ring in Brevard County, Florida

  Beginning in October 2015, ICE agents worked with the Brevard County Clerk of the Court to investigate a surge in the number of aliens from former Soviet countries marrying US citizens in the County. This investigation led to multiple charges and convictions for marriage fraud, conspiracy to engage in marriage fraud, and encouraging or inducing an alien to reside in the United States. Five individuals were sentenced to terms in federal prison stemming from the investigation, one is awaiting sentencing, and three others are set for trial in May 2018.

- DHS Extends the Designation of Syria for Temporary Protected Status

  On March 5, 2018, DHS published notice that it extended the designation of Syria for TPS for an additional 18 months, from April 1, 2018, to September 30, 2019. DHS also set forth procedures for nationals of Syria to re-register for TPS and apply for employment authorization.

DOS

- DOS Publishes Updates to 9 FAM

  On March 3, 2018, DOS updated 9 FAM 302.1 (U), Ineligibility Based on Inadequate Documentation of Qualification. The updates include grammatical changes and clarifying language throughout. On the same date, DOS made updates to 9 FAM 403.2, NIV Application. The updates include grammatical edits and clarifying language at 9 FAM 403.2-5(B)(1), paragraph e, and relocation of sections. On February 28, 2018, DOS updated 9 FAM 401.1, Introduction to Nonimmigrant Visas and Status. The update changed the word "shall" to "may" in the following provision – "If an applicant fails to satisfy you that he or she is entitled to the relevant status under INA 101(a)(15), that determination does not constitute an independent ground of inadmissibility under INA 212(a) and may not be used as such."

Supreme Court

OPINION

- U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC

  No. 15-1509, 2018 U.S. LEXIS 1520 (U.S. Mar. 5, 2018) (Standard of Review)

  The Supreme Court held, in the bankruptcy context, that clear error review applies to the mixed question of fact and law of whether a transaction was conducted at arm's length. The Court described the process of resolving that mixed question as "tak[ing] a raft of case-specific historical facts, consider[ing] them as a whole, balanc[ing] them one against another—all to make a determination that when two particular persons entered into a particular transaction, they were (or were not) acting like strangers." The Court determined that because the question entailed "primarily . . . factual work," it was most appropriately answered by the court "that

has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and deepest understanding of the record."

CERT. DENIED

- Minto v. Sessions

No. 17-6321, 2018 U.S. LEXIS 1568 (U.S. March 5, 2018)

Questions presented are unavailable at this time.

- Jaquez v. Sessions

No. 17-971, 2018 U.S. LEXIS 1543 (U.S. March 5, 2018)

Questions Presented: 1) Whether the U.S. Supreme Court precedent in [Holland v. Florida, 560 U.S. 631 (2010)] precludes the Fifth Circuit Court of Appeals from adopting a rigid, inflexible standard for assessing equitable tolling requests in immigration cases because, as Holland, 560 U.S. at 650, provides, the "exercise of a court's equity powers . . . must be made on a case-by-case basis," and "'flexibility' . . . enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices'"; and 2) Whether the Fifth Circuit Court of Appeals erred, as a matter of law, in applying a stringent rule for measuring due diligence for purposes of equitable tolling, despite its own precedential decision in [Lugo-Resendez v. Lynch, 831 F.3d 337, 344-45 (5th Cir. 2016)], where it held that the inquiry of whether equitable tolling is appropriate does not involve bright-line rules and must be evaluated based on the individual facts and circumstances of each case.

PET. FOR REHEARING DENIED

- Madrigales-Rodriguez v. Sessions

No. 17-741, 2018 U.S. LEXIS 1611 (March 5, 2018)

The petition for rehearing argued that the petitioner's due process rights under the Fifth Amendment due to ineffective assistance of counsel were violated, and that he had suffered substantial prejudice amounting to a due process violation. The petition for certiorari was previously denied on January 16, 2018.

First Circuit

- Sosa-Perez v. Sessions

No. 17-1304, 2018 WL 1075753 (1st Cir. Feb. 28, 2018) (Past Persecution-Nexus; Due Process)

The First Circuit denied the PFR, concluding that substantial evidence supports the agency's ruling that the petitioner did not establish a nexus between her claimed past persecution and her family membership. The court also affirmed the agency's finding that the petitioner did not show "regular and widespread persecution creating a reasonable likelihood of persecution of all persons in the group," so as to establish a pattern or practice of persecution. Regarding the petitioner's due process claim, the court held that "she has not pointed to any evidence that was unfairly excluded from the BIA's analysis, nor any argument that was overlooked that would support a finding that she did not receive a 'fair opportunity to be heard.'"

Second Circuit

- Hernandez v. Sessions

No. 16-2323-ag, 2018 WL 1074152 (2d Cir. Feb. 28, 2018) (Material support bar; due process)

The Second Circuit denied the PFR, concluding that the agency's determination on remand that the material support bar to asylum relief contains no implied duress exception—in Matter of M-H-Z-, 26 I&N Dec. 757 (BIA 2016)—is entitled to Chevron deference. The court also held that aliens found to be ineligible for relief from removal by the material support bar do not have a due process right to other means of obtaining an exception based on duress.

Ninth Circuit

- Ming Dai v. Sessions

No. 15-70776, 2018 WL 1189642 (9th Cir. Mar. 8, 2018) (Credibility)

The Ninth Circuit granted the PFR concluding that the petitioner established past persecution on account of his political opinion ("[other] resistance to a coercive population control program") and that a remand is not needed where that the Government had not attempted to rebut the presumption of a well-founded fear of future persecution. The court remanded for the BIA to grant withholding of removal and to exercise its discretion as to whether to grant asylum. In this REAL ID Act case, the court reaffirmed its "well-established" rule that, absent an explicit adverse credibility finding by the agency, the court must accept the petitioner's testimony as credible. The court determined that, because the petitioner and his wife were not "similarly situated," the Board erred in concluding that his wife's voluntary return to China undermined the petitioner's own fear of future persecution. Further, the Court found that absent an adverse credibility finding, the Board erred in relying on the petitioner's untruthfulness about his wife's voluntary return to China to conclude that he failed to meet his burden of proof. The dissent argued that the majority opinion "demolishes both the purpose and the substance of the REAL ID Act, disregards the appropriate standard of review, and perpetuates [the court's] idiosyncratic approach to an IJ's determination that the testimony of an asylum seeker lacks sufficient credibility or persuasiveness to prove his case."

- Elmakhzoumi v. Sessions

No. 16-16232, 2018 WL 1094394 (9th Cir. Mar. 1, 2018) (Agg Fel)

The Ninth Circuit affirmed the district court's holding, concluding that the petitioner's conviction for violating Cal. Penal Code § 286(i) (sodomy where the victim is unable to consent) qualifies as an aggravated felony rape offense under section 101 (a)(43)(A) of the

Act. In reaching this conclusion, the court relied on the definition of "rape" articulated in Castro-Baez v. Reno, 217 F.3d 1057, 1059 (9th Cir. 2000), which rejected the use of federal statutes to determine the generic definition of "rape" under the Act.

Eleventh Circuit

- Vallenilla v. U.S. Att'y Gen.

  No. 17-10263, 2018 WL 1136055 (11th Cir. Mar. 2, 2018) (unpublished) (ACF)

  The Eleventh Circuit granted the PFR, concluding that "the perceived omissions and inconsistencies that the BIA and IJ relied on are not plausible or material . . . and do not support [an] adverse-credibility determination." Additionally, the court found that the petitioner presented a substantial amount of corroborating evidence and that the Board did not make a finding that the corroborating evidence it determined she should have provided was reasonably available.